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No. 81-109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAMON CASTRO
and
MARIA DEL SOCORRO CASTRO,
Petitioners

vs.

SAUDI ARABIA,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

QUINTON ETZEL
HAYGOOD GULLEY
DORAN, GULLEY & ETZEL
P.O. Box 1485
Del Rio, Texas 78840
512/775-7474

Attorneys for Respondent,
KINGDOM OF SAUDI ARABIA

SUBJECT INDEX

	Page
Response to Questions Presented	1
Opinions Below	2
Statement of Jurisdiction	2
Statutes Involved	2
Counterstatement of Case	5
RESPONSE TO ARGUMENT FOR ALLOWANCE OF THE WRIT	
I. THE LOWER COURTS HAVE CORRECTLY DECIDED THE JURISDICTIONAL QUESTIONS PRESENTED	9
II. THE LOWER COURTS FOLLOWED THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS	13
Conclusion	15
Certificate of Service	16

LIST OF AUTHORITIES

CASES

	Page
Chicago Bridge v. Islamic Republic of Iran, 506 F. Supp. 981, 983 (1980)	12, 13, 14
International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C. D. Cal. 1979)	11, 12, 13, 14
Letelier v. Republic of Chile, 488 F. Supp. 665 (1980)	12, 13, 14
Nishimatsu Construction Co., Ltd. v. Houston National Bank, 515 F. 2d 1200, 1205 (5th Cir. 1975)	12, 14
Orange Theatre Corporation v. Rayherstz Amusement Corporation, 139 F. 2nd 871, 873 (3rd Cir. 1944)	12
Puente v. Spanish National State, 116 F. 2d 43 (2nd Cir. 1940)	12, 14
Warner v. Territory of Hawaii, 206 F. 2d 851, 852 (9th Cir. 1953)	14

STATUTES

28 U.S.C., §1254 (1) 2
28 U.S.C., §1330 6
28 U.S.C., §1330 (a) 2, 10, 11
28 U.S.C., §1330 (b) 2, 10, 12
28 U.S.C., §1602 ..... 2, 6
28 U.S.C., §1604 ..... 3, 10
28 U.S.C., §1605 (a) (1) 10
28 U.S.C., §1605 (a) (2) 10
29 U.S.C., §1605 (a) (5) 3, 10, 12
28 U.S.C., §1606 3
28 U.S.C., §1607 10
28 U.S.C., §1608 (a) (3) 4
28 U.S.C., §1608 (a) (4) 4
28 U.S.C., §1608 (c) (1) 5
28 U.S.C., §1608 (c) (2) 5
28 U.S.C., §1608 (d) 5
28 U.S.C., §1608 (e) 5

OTHER AUTHORITIES

Page

Rule 60 (b), Federal Rules of Civil Procedure 13
1 Moore's Federal Practice, ¶0.60[4], at 624-628 (2d ed. 1979) . 12
Random House College Dictionary, rev. edit. (1975) 10
Wright & Miller, Federal Practice &Procedure §2695, P. 326 11

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Respondent, Saudi Arabia would respectfully show this Honorable Court that the Court of Appeals for the Fifth Circuit, correctly affirmed the District Court's dismissal of Petitioners' action, and there are no valid issues for this Honorable Court to review.

RESPONSE TO QUESTIONS PRESENTED

1. The District Court correctly decided it did not have jurisdiction over the Kingdom of Saudi Arabia.
2. The District Court correctly decided to void Petitioners' Default Judgment for lack of jurisdiction, and dismiss their complaint.

OPINIONS BELOW

The District Court's Order declaring the Petitioners' Default Judgment void is reported as *Castro v. Saudi Arabia,* 510 F. Supp. 309 (1980). The District Court's initial Default Judgment is unreported. The Court of Appeals for the Fifth Circuit summarily affirmed the Judgment of dismissal without opinion, and denied the Petition for Rehearing. All of the above Orders are included in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgment on March 26, 1981. The Court denied Petitioners' Motion for Rehearing on April 24, 1981. The applicable statutory provision is 28 U.S.C. §1254 (1).

STATUTES INVOLVED

28 U.S.C. §1330:

> (a) The district courts shall have jurisdiction without regard to amount in controversy of any non jury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. §1602:

> The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the

rights of both foreign states and the litigants in United States Courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1604:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1605:

(a) A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—

* * *

(5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . .

28 U.S.C. §1606:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section

1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; . . .

28 U.S.C. §1608:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

* * *

(3) . . . by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Colunbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a

form prescribed by the Secretary of State by regulation.

* * *

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a) (4) as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

COUNTERSTATEMENT OF CASE

The Petitioners, Ramon and Maria del Socorro Castro filed their original complaint against the Kingdom of Saudi Arabia on February 19, 1979. They alleged Saudi Arabia's liability under Texas Tort Law for the actions of a Royal Saudi Air Force officer in causing the death of the Castros' teenage sons in an automobile accident. The acci-

dent occurred near Del Rio, Texas. The Petitioners brought the suit pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611, and claimed jurisdiction based on 28 U.S.C. §1330.

On September 1, 1976, the Kingdom of Saudi Arabia and the United States Government entered into an agreement for the training of Royal Saudi Air Force cadets at Laughlin Air Force Base, Texas. The agreement provided the United States Government would train the Saudi pilots to fly United States military aircraft on a *non-profit* basis. In return, the Saudi government agreed to be responsible for the cost of the training. The costs enumerated in the contract are housing, medical care, transportation, pay, and allowances. The Saudi government also agreed to indemnify and hold the United States Government harmless from any loss or liability the United States Government might incur in connection with the military training.

Ali Atallah Al-Qassimie, a lieutenant in the Royal Saudi Air Force, came to Laughlin Air Force in 1977 to learn to fly United States military aircraft. He trained on the T-57 (jet trainer) for approximately nine (9) months. Also, in 1977, he passed the Texas Driver's License examination and was issued a Texas Driver's License. After completing his training on the T-57, he returned to Saudi Arabia. In the spring of 1978, Lt. Al-Qassimie returned to Laughlin Air Force Base to complete his military training. After his return, he purchased an automobile in Del Rio, Texas, and he also purchased automobile liability insurance in accordance with Laughlin Air Force Base regulations.

Lt. Al-Qassimie was assigned to the 47th Student Squadron and he was housed in military housing on the Base. He was subject to the United States Air Force rules and regulations while stationed at Laughlin Air Force

Base. Further, all his training activities took place at the Air Force Base, and the automobile was used for his personal use and enjoyment.

The tragic accident occurred at approximately 2:00 o'clock A.M. on September 17th, 1978. The United States Air Force had no scheduled training activities on either September 16 or September 17, 1978. Lt. Al-Qassimie was off duty at this time, in civilian clothes and pursuing his own personal interests at the time of the accident.

On Saturday, September 16, 1978, Lt. Al-Qassimie left Laughlin Air Force Base between 9:00 and 11:00 P.M. in his automobile and arrived at Studio One, a disco in Del Rio, Texas, shortly thereafter. While at Studio One he drank one glass of Chivas and 7UP. Later that evening he left Studio One and met some friends at Sambo's Restaurant for coffee. After visiting with his friends, he started back to Laughlin Air Force Base from Del Rio, Texas.

When Al-Qassimie left Sambo's, it was in the early morning and dark. He was traveling East on Highway 90, driving in the right hand lane. He was driving within the speed limit, when suddenly two individuals appeared in front of him on the road. He started to turn to the left to avoid the pedestrians, but was blinded by the lights of a car coming behind him. He then turned to the right, to avoid the pedestrians, but instead struck them. Both pedestrians died instantly.

After the impact, Lt. Al-Qassimie's car turned over. He got out of the automobile by breaking a window. He then tried to find the pedestrians, but couldn't in the dark. He also tried to flag down another automobile for help. Shortly after the accident, the local police department gave Lt. Al-Qassimie a breathalyzer test, which he passed.

He tested well within the legal limits for sobriety.

The Plaintiffs, Ramon and Maria Del Socorro Castro immediately brought suit in State Court against Lt. Al--Qassimie for the wrongful deaths of their sons. Their action was filed on September 28, 1978, in the 63rd Judicial District Court of Val Verde County, Texas. This suit was subsequently settled out of Court.

The Castros then filed a claim under the Federal Tort Claims Act against the United States Air Force. They claimed the United States Air Force was responsible for the death of their sons, as Lt. Al-Qassimie was subject to the control of the United States Air Force and was acting within the scope of his employment. The United States Air Force denied this claim on July 16, 1979.

The Plaintiffs filed this action against Saudi Arabia. Although the Plaintiffs attempted service of process pursuant to the Foreign Sovereign Immunities Act, the Kingdom of Saudi Arabia did not learn of this lawsuit until well after the sixty (60) days notice for filing an answer had expired. Saudi Arabia did not learn of this action until late September of 1979. Some of the problems that caused the delay in answering the lawsuit were: The Kingdom of Saudi Arabia had no Ambassador to the United States from January through July of 1979; the Saudi officials in Jidda who dealt with the documents had limited understanding of the English language, customs and United States legal procedures; and the Saudi culture does not recognize time as being of the essence.

On June 26, 1979, the Plaintiffs had moved for a Default Judgment. The District Court conducted an evidentiary hearing on August 14-17, 1979, and rendered a Default Judgment on November 8, 1979. The Kingdom of Saudi Arabia filed its answer to the complaint on

November 9, 1979, in which it specifically pled its sovereign immunity. The Court entered its Default Judgment against the Kingdom of Saudi Arabia on November 10, 1979.

Immediately after Saudi Arabia's attorney learned of the entry of the Default Judgment, it filed Motions asking that the Default Judgment be voided for lack of jurisdiction and in the alternative that a new trial be granted. On April 22-23, 1980, the District Court held a full and extensive hearing on the Motions to declare the Judgment void for lack of jurisdiction, and on the Motion for New Trial. After hearing the testimony of witnesses, and the argument of counsel, the Court requested each party to prepare findings of fact and conclusions of law, and to submit supplemental briefs supporting their positions. After careful study of the record, the supplemental material furnished by counsel, the District Court correctly dismissed the Castros' action for lack of jurisdiction.

On June 12, 1980, the District Court issued an opinion and Order granting Saudi Arabia's Motion to Vacate the Default Judgment for lack of jurisdiction and dismissing the suit, and also conditionally granted Saudi Arabia's Motion for New Trial based on the finding that the default was not willful. (Appendix B). The Court of Appeals summarily affirmed the Order of Dismissal for lack of jurisdiction.

RESPONSE TO ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE LOWER COURTS HAVE CORRECTLY DECIDED THE JURISDICTIONAL QUESTIONS PRESENTED.

The Foreign Sovereign Immunities Act of 1976 sets forth the statutory presumption of immunity by providing that "A foreign state shall be immune from the jurisdiction from the courts of the United States.", 28 U.S.C. Section 1604. The Act creates exceptions to immunity when the state descends from its position as a sovereign to engage in the ordinary activities of private persons. 28 U.S.C. Section 1605 to 1607.

The Castros have predicated their claim on the exceptions to sovereign immunity set forth in Section 1605 of the act. The record provides overwhelming support for the District Court's conclusion that the acts of the sovereign defendant were governmental, thus rendering the defendant immune from jurisdiction of the United States. Furthermore, the District court's order declaring the default judgment void for lack of jurisdiction and dismissing the action is in full accord with the pertinent legal authorities.

Although the Castros first claimed jurisdiction pursuant to §1605(a) (2), commercial activity, then §1605(a) (1), waiver, they now predicate their claim upon §1605(a) (5), the non-commercial tort exception to the Act. Accordingly, only if the sovereign, or an employee of the sovereign acting within the scope of his duty, caused damage by a tortious act of omission, does the court have subject matter jurisdiction. Subject matter jurisdiction must exist, §1330(a), and then proper service must be made pursuant to §1330(b), before the court has personal jurisdiction.

The word "jurisdiction" is defined in the *Random House College Dictionary*, rev. edit. (1975) as being "(1) The right, power or authority to administer jurisdiction. (2) Authority; control. (3) The extent or range of jurisdic-

tion or other authority." Jurisdiction is by its nature the most basic and elementary concept in a legal process. In order that a court have jurisdiction (or power) it must have authority over both the subject matter of the controversy and the parties to the controversy. This concept is "bedrock" to our judicial system.

The Court in *International Association of Machinists v. OPEC*, 477 F. Supp. 553, 564/565 (1979)[1] discussed jurisdiction at length. The Court held in part that it (the Court) must on its own Motion make a determination as to whether or not the Court has jurisdiction before it can proceed in any given case. Consequently, sovereign immunity has been given jurisdictional status, and must be the first question addressed by the Court in determining whether it has jurisdiction. 477 F. Supp. at 555.

The Castros contend the default judgment against Saudi Arabia precludes further judicial scrutiny of the jurisdictional issue. Subject matter jurisdiction is something the Plaintiffs either have or do not have. It has been firmly established that subject matter jurisdiction cannot be conferred upon a Court by consent of the parties, whether by affirmation or by acquiescence. Wright & Miller, Federal Practice and Procedure, §2695, p. 326. Further, the issue of subject matter jurisdiction can be raised by the Court sua sponte at any time, and no Court

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[1]. "Subject matter jurisdiction has granted the District Courts to hear actions against foreign States under 28 U.S.C., §1330(a) as explicitly provided by this statute, however, District Courts only have jurisdiction to hear such actions when the foreign State is not entitled to immunity. Consequently, the question of sovereign immunity has been given jurisdictional status by its express inclusion in this statute and must be the first question addressed by the Court in determining whether this Court has been presented evidence satisfactory to support its jurisdiction to grant Plaintiffs' claim for relief." *International Association of Machinists v. OPEC*, 477 F. Supp. 553, 564/565 (1979).

should be expected to stultify itself by entering into a judgment it cannot enforce against protest. *Nishimatsu Construction Co., Ltd. v. Houston National Bank,* 515 F. 2d 1200, 1205 (5th Cir. 1975); 1 Moore's Federal Practice ¶0.60[4], at 624-28 (2d ed. 1979). The failure to assert the defense of jurisdiction cannot be treated as a waiver prior to Defendant's voluntary appearance in Court. *Puente v. Spanish National State,* 116 F. 2d 43 (2nd Cir. 1940); *Orange Theatre Corporation v. Rayherstz Amusement Corporation,* 139 F. 2nd 871, 873 (3rd Cir. 1944).

The District court correctly determined the Castros' allegations of tortious acts by the foreign sovereign were not enough to give the Court jurisdiction. *International Association of Machinists v. OPEC,* 477 F. Supp. 553, 564/565 (1979). The Court in *Chicago Bridge v. Islamic Republic of Iran,* 506 F. Supp. 981, 983 (1980), also ruled the question of sovereign immunity is jurisdictional and is the first question the Court must address before it can proceed. This reasoning is also consistant with the Court's reasoning in *Letelier v. Republic of Chile,* 488 F. Supp. 665 (1980), an action under §1605(a)(5), the non-commercial tort exception to the Act. The Court held an evidentiary hearing on the issue of subject matter jurisdiction after the initial entry of a default judgment against the sovereign. The court felt that it must engage in a close examination of the underlying cause of action in order to decide whether the Plaintiffs may obtain jurisdiction over the sovereign. 488 F. Supp. at 671.

The District Court basically found that the Castros did not meet their burden of proof under the *Act* to establish an exception to the Foreign Sovereign Immunities Act. Thus, the Castros did not prove subject matter jurisdiction over the Kingdom of Saudi Arabia, and pursuant to U.S.C. §1330(b) could not have personal

jurisdiction. The Court properly dismissed the Castros' complaint for want of jurisdiction.

II. THE LOWER COURTS FOLLOWED THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

The Court of Appeals for the Fifth Circuit correctly affirmed the District Court's dismissal of the Castros' claim for want of jurisdiction. The District Court reviewed the sovereign Defendant's timely Motions to Vacate the Default Judgment and for New Trial in an evidentiary hearing after the initial default. This procedure was consistant with Rule 60(b) of the Federal Rules of Civil Procedure, and with the procedures followed by other District Courts in determining the jurisdictional issue under the Foreign Sovereign Immunities Act. *International Association of Machinists v. OPEC*, 477 F. Supp. 553, 564/565 (1979), *Chicago Bridge v. Islamic Republic of Iran*, 506 F. Supp. 981, 983 (1980) and *Leterlier v. Republic of Chile*, 488 F. Supp. 665 (1980).

The sovereign Defendant presented the District court with the threshold question of jurisdiction one day after the Court rendered the Default Judgment, and one day prior to entry of the Judgment. The Defendant answered on November 9, 1979, specifically claiming Sovereign Immunity. Shortly thereafter, the Defendant timely filed its Motion for New Trial and Motion for Dismissal for Want of Jurisdiction.

The District Court held an evidentiary hearing on the Sovereign Defendant's Motions, received evidence, and entertained oral argument. This procedure has been followed uniformly by the District courts throughout the country. The Castros contend this procedure was error, and the initial Default should have precluded the Court

from considering the jurisdictional issue. Since the Court has a duty to scrutinize continually its power to act, it was appropriate for the District Court to examine the existence of jurisdiction. *Warner v. Territory of Hawaii*, 206 F. 2d 851, 852 (9th Circ. 1953). The jurisdictional issue can be raised at anytime, even by the Court sua sponte. *Nishimatsu Construction Co., Ltd. v. Houston National Bank*, 515 F. 2d 1200, 1205 (5th Cir. 1975). The Court either has jurisdiction over the subject matter and the parties, or it does not. No Court should be required to enter an Order it cannot enforce against protest. *Puente v. Spanish National State*, 116 F. 2d 43 (2nd cir. 1940).

The question placed before the District court was whether or not the Castros had met their burden to show their cause of action placed Saudi Arabia within one of the exceptions to Sovereign Immunity. Sovereign Immunity is jurisdictional, and its absence is a prerequisite to both subject matter and personal jurisdiction. *International Association of Machinists v. OPEC*, 477 F. Supp. 553, 564/565 (1979). See also *Chicago Bridge v. Islamic Republic of Iran*, 506 F. Supp. 981, 983 (1980). Saudi Arabia demonstrated that none of the exceptions to Sovereign Immunity operated to deprive it of immunity from the Court's jurisdiction. Consequently, the District court correctly declared the Default Judgment void.

The jurisdictional issue cannot be put to bed by means of a Default Judgment. Because of the close identity between procedure and substance in the Foreign Sovereign Immunities Act, the Courts must look closely into the Plaintiffs' underlying cause of action to determine the absence of Sovereign Immunity. *Leterlier v. Republic of Chile*, 488 F. Supp. 665, 671 (1980) The District Court's evidentiary hearing to make this determination is consistent with the actions of other Courts. *Chicago Bridge v.*

Islamic Republic of Iran, 506 F. Supp. 981, 983 (1980). After the evidentiary hearing, the District Court found the Plaintiff did not meet his burden of proof to show the sovereign fit into one of the exceptions that would deprive it of immunity under the Foreign Sovereign Immunity Act. The Court of Appeals correctly affirmed this decision.

CONCLUSION

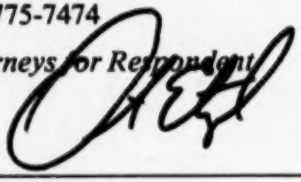
WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari. The District Court correctly declared the Petitioners' Default Judgment void for lack of jurisdiction and dismissed their complaint. The Court of Appeals for the Fifth Circuit correctly affirmed the District Court's Judgment. Both Courts followed accepted judicial procedure, and there are no valid issues for this Honorable Court to review.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been mailed to the attorneys of record for the Petitioners in this cause, Mr. Broadus A. Spivey, at his proper post office address of SPIVEY AND GRIGG, P.O. Box 2011, Austin, Texas, 78768, and to V.F. Knickerbocker, at his post office address of KNICKERBOCKER, ABRAMS & COWAN, 468 Main Street, Eagle Pass, Texas, 78852, on this the 7th day of September, 1981.

Respectfully submitted,

QUINTON ETZEL
HAYGOOD GULLEY
DORAN, GULLEY & ETZEL
307 E. Tenth Street
P.O. Box 1485
Del Rio, Texas 78840
512/775-7474
Attorneys for Respondent



By: _____
QUINTON ETZEL

APPENDIX

Order Granting Plaintiffs' Motion for Default Judgment as to Ramon Castro Robles and Maria del Socorro Castro, and Denying Plaintiffs' Motion for Default Judgment as to all Other Plaintiffs A-1

Order Declaring Default Judgment Void for Lack of Jurisdiction and Dismissing Action B-1

Judgment of the United States Court of Appeals for the Fifth Circuit C-1

Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RAMON CASTRO, MARIA DEL SOCORRO CASTRO, MARTHA ELENA CASTRO, BERTHA ALICIA CASTRO, SOCORRO GUADALUPE CASTRO, JESUS RAMON CASTRO, AND ROSE ISELA CASTRO, INDIVIDUALLY AND AS THE SURVIVORS OF JOE RAYMOND CASTRO AND GREGORIO CASTRO	§	DR-79-CA-05
VS.	§	
SAUDI ARABIA	§	

ORDER GRANTING PLAINTIFFS'MOTION FOR DEFAULT JUDGMENT AS TO RAMON CASTRO ROBLES AND MARIA DEL SOCORRO CASTRO, AND DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AS TO ALL OTHER PLAINTIFFS

On August 16-17, 1979, this court held an evidentiary hearing on the Plaintiffs' Motion for Default Judgment. At the close of the evidence, the court directed Plaintiffs to submit proposed findings of fact and conclusions of law and a proposed judgment. This having been done, the court finds that Plaintiffs Ramon Castro Robles and Maria Del Socorro Castro, parents of the deceased, have established their right to relief by evidence satisfactory to the court and a default judgment shall be entered in their favor. The other Plaintiffs are not entitled to judgment.

The court makes the following findings of fact and conclusions of law. Any conclusion of law that is deemed to be a finding of fact is adopted as such. Conversely, any finding of fact that is deemed to be a conclusion of law is adopted as such.

FINDINGS OF FACT

1. At approximately 3:15 A.M. on September 17, 1978, Ali Atallah Al-Qassimie drove a 1971 Cadillac into Joe and Gregorio Castro, causing their deaths.

2. At the time of the collision, Joe and Gregorio Castro were pedestrians walking alongside of the road, but not on the road.

3. The car driven by Al-Qassimie left the road about 162 feet before it struck Joe and Gregorio Castro. The car traveled 49 feet more, hit a culvert, and continued another 75 feet before it came to a final rest.

4. Joe and Gregorio Castro, aged 17 and 18, were killed instantly. The car was a total loss.

5. Al-Qassimie was driving the car at an excessive rate of speed.

6. Al-Qassimie failed to keep control of the car he was driving and failed to keep it on the road.

7. At the time of the collision, Al-Qassimie was under the influence of alcohol.

8. Al-Qassimie was a student pilot, attached to Laughlin Air Force Base. He was sent to the United States by contractual agreement to learn to speak English and fly American jet fighters.

9. Al-Qassimie had a Texas driver's license.

10. The course of conduct between Saudi Arabia and the

United States, as evidenced by the contract, was commercial in nature.

11. By the terms of its contract with the United States, Saudi Arabia assumed responsibility for all student transportation.

12.To fulfill this responsibility, Saudi Arabia furnished Al-Qassimie with money to purchase a private automobile. Saudi Arabia furnished no other transportation arrangements.

13. The Saudi Arabian culture is markedly different from American culture. The Arabians have a different concept of time than we do in our culture. Also, alcohol consumption is severely restricted in Saudi Arabia.

14. The above cultural differences increased the driver's reaction time and thus contributed to the fatal accident.

15. The government of Saudi Arabia failed to adequately train, indoctrinate, or otherwise prepare Al-Qassimie for life in the United States and for driving in the United States.

16. The government of Saudi Arabia failed to control Al-Qassimie's consumption of alcoholic beverages.

17. Service was first made upon the Defendant, Saudi Arabia, when the clerk of court sent a copy of the summons and complaint and a notice of suit, together with a translation of each into Arabic, by direct mail requiring a signed receipt to the Ministry of Foreign Affairs of Saudi Arabia. The return receipt was signed by the proper authority. However, no response was forthcoming from Saudi Arabia within 60 days of the date the return receipt was signed; indeed, no response has been received to this date.

18. Service was again made, this time through diplomatic

channels. Two copies of the summons and complaint, notice of suit, and affidavit of Dr. Nigil Burgheim, together with an Arabic translation of each, was sent by registered mail on April 4, 1979, by the clerk of court to Mr. Allan Gise, Director of Special Consular Services in Washington, D.C. The return receipt is signed by Brian Thomas, who is Chief, Near East and South Asia Division, Office of Citizen's Consular Services. Copies of the summons, complaint, notice of suit, and translations were delivered with diplomatic note, to the Royal Ministry of Foreign Affairs of the Kingdom of Saudi Arabia on May 26, 1979.

19. No response was forthcoming from Saudi Arabia within 60 days of May 26, 1979, the date of transmittal indicated in the diplomatic note, or, in fact, to this date.

20. Attorneys and representatives of the Kingdom of Saudi Arabia were personally told at a state court related deposition of Al-Qassimie that a lawsuit would probably be filed against Saudi Arabia.

21. Brian Thomas received a cable from the United States Embassy in Jidda, stating that the Arabs had returned the documents served upon them, and that they wanted the United States Embassy to defend for them on the grounds of immunity. The United States Embassy notified the Saudi Arabian government that it would not defend the lawsuit for the Kingdom of Saudi Arabia.

22. The government of Saudi Arabia was informed in writing, as well as personally by Brian Thomas, that they should appear and file a formal answer or that a default judgment would be taken.

23. The failure of Saudi Arabia to answer or otherwise appear in this action was, by all indications, knowing and wilful.

24. Joe and Gregorio Castro were the two oldest children in the family. Their father has been disabled since 1972; the two boys were heavily depended upon by their parents.

25. Based on the average earning capacity of Texas high school graduates, adjusted over the life expectancy of the parent with the longer life expectancy, reduced for personal consumption, increased at a long-term wage increase rate of 5% a year, and discounted to present value at a 8½% rate, the earning capacity of Joe Castro was about $419,000 and of Gregorio Castro, about $376,000. The total earning capacity of the two boys was $795,846.

26. The boys averaged 20-30 hours of household services and chores in the parents' home each week, which, after discounting, is valued at about $74,000 each, or a total of $147,816.

27. The funeral and burial expenses amounted to $1,580.

28. Plaintiffs sustained actual damages for the loss of society, support, care, counsel, advice, and comfort given them by Joe and Gregorio Castro of $20,000.00 each, or $40,000.00.

CONCLUSIONS OF LAW

1. Jurisdiction is proper in this court.

2. Plaintiffs strictly complied with the provisions of 28 U.S.C. §1608(a) (3) and (4) relating to service of process on the government of Saudi Arabia. Those were the proper service provisions in this case.

3. The court was required to conduct a hearing on the evidence, and have the claim or right to relief established by evidence satisfactory to the court. 28 U.S.C. §1608(e).

4. The hearing on the evidence resembles the hearing required by Rule 55(e), F.R.Civ.P., before a default judg-

ment can be entered against the United States. 1976 U.S. CODE CONG. & AD. NEWS 6625.

5. In the contract with the United States, the government of Saudi Arabia expressly and impliedly waived the defense of sovereign immunity in accordance with 28 U.S.C. §1605(a) (1).

6. The contractual arrangement between the governments of Saudi Arabia and the United States is a "commercial activity" within the meaning of 28 U.S.C. §§1603(d) and 1605(a)(2). *National American Corp. v. Federal Republic of Nigeria,* 448 F. Supp. 622, 642 (S.D.N.Y. 1978).

7. Ali Atallah Al-Qassimie was negligent:
   a. in driving while intoxicated;
   b. in failing to maintain a proper speed;
   c. in failing to keep a proper lookout;
   d. in leaving the roadway and striking Joe and Gregorio Castro.

8. The deaths of Joe and Gregorio Castro were proximately caused by the negligence of Al-Qassimie. *Missouri Pac. R. Co. v. American Statesman,* 552S.W.2d99, 103-104 (Tex. 1977).

9. Al-Qassimie was an agent of the government of Saudi Arabia, sent to the United States to learn to speak English and fly American jet fighters. *Valley View Cattle Co. v. Iowa Beef Processors,* 548 F.2d 1219, 1221 (5th Cir.), *cert. denied,* 434 U.S. 855 (1977).

10 The particular circumstances involved indicate that at all relevant times while in the United States, Al-Qassimie was within the scope of his office or employment. *See, Kulms v. Jenkins,* 557 S.W.2d 149, 152 (Tex.Civ.App.—Amarillo 1977, writ ref'd. n.r.e.); *G&H Equipment Co., Inc. v. Alexander,* 533 S.W.2d 872 (Tex.Civ.App.—Fort Worth 1976, no writ history); *Best Steel Bldgs., Inc. v.*

Hardin, 553 S.W. 2d 122, 128 (Tex.Civ.App.—Tyler 1977, writ ref'd. n.r.e.).

11. The government of Saudi Arabia was negligent in doing those acts set forth in findings of fact paragraph numbers 12, 15, and 16.

12. Saudi Arabia negligently entrusted the use of a private automobile to Al-Qassimie. *Hines v. Nelson, 547 S.W.2d 378, 385 (Tex.Civ.App.—Tyler 1977, no writ).*

13. The negligence of Saudi Arabia was a proximate cause of the deaths of Joe and Gregorio Castro. *Missouri Pac. R. Co. v. American Statesman,* 552 S.W.2d at 103-104.

14. Texas law controls on all substantive issues in the instant case. *Cf. Alexander v. United States,* No. 77-1612 (5th cir. October 31, 1979), slip op. at 635 (A tort case under the Federal Tort Claims Act.)

15. The Texas wrongful death statutes create a cause of action, not existing at common law, for the death of a person. Tex. Rev. Civ. Stat. Ann. art. 4671 (Supp. 1979); *Mitchell v. Akers,* 401 S.W.2d 907, 909 (Tex.Civ. App.—Dallas 1966, writ ref'd n.r.e.).

16. The parents of the deceased can bring an action for damages arising from death. The brothers and sisters, however, do not have a right to bring an action. Tex. Rev. Civ. Stat. Ann. art. 4675 (1940); *Boudreaux v. Texas N.O.R. Co., 78 S.W.2d 641, 642 (Tex.Civ.App.-Beaumont* 1935, writ ref'd).

17. The parents of Joe and Gregorio Castro are entitled to recover the amount that their two children would have contributed to their support, had the children lived. *Missouri-Kansas-Texas Railroad Company v. Pierce,* 519 S.W.2d 157 (Tex.Civ.App.—Austin 1975, writ ref'd n.r.e.)

18. Also, the parents may recover the money value of labor, services, kindness, advice, counsel, and attention that the children would have contributed. *Borak v. Bridge,* 524 S.W.2d 773, 776 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.).

19. Saudi Arabia is not liable for punitive damages. 28 U.S.C. §1606.

20. Ramon Castro Robles and Maria Del Socorro Castro, parents of the deceased boys, are entitled to a default judgment against Saudi Arabia in the amount of Nine Hundred Eighty-Five Thousand Two Hundred Forty-Two Dollars ($985,242.00).

21. Judgment shall be entered and the Clerk shall send a copy of this order and the default judgment entered thereon, to the Defendant, Saudi Arabia, in the manner prescribed for service in 28 U.S.C. §1608. 28 U.S.C. §1608(e).

SO ORDERED this 8th day of November, 1979.

/s/ D.W. SUTTLE
United States District Judge

Ramon CASTRO, Maria Del Socorro Castro, Martha Elena Castro, Bertha Alicia Castro, Socorro Guadalupe Castro, Jesus Ramon Castro, and Rose Isela Castro, Individually and as the survivors of Joe Raymond Castro and Gregorio Castro

v.

SAUDI ARABIA.

No. DR-79-CA-05.

United States District Court,
W. D. Texas,
Del Rio division.

June 12, 1980.

Plaintiffs brought action against foreign government. Following entry of default judgment against foreign government, defendant filed its answer. The District Court, Suttle, Senior District Judge, held that it was without jurisdiction over foreign government in suit arising out of agreement entered into between foreign government and United States for the training of military personnel, in absence of showing that any of the exceptions of the Foreign Sovereign Immunities Act deprived foreign government of its immunity.

Default judgment declared void.

1. Federal Civil Procedure —2441

Even though district court had previously entered default judgment against defendant, it would reexamine the issue of subject-matter jurisdiction, since without subject-matter jurisdiction default judgment was a nullity.

2. International Law —10.29

Section of Foreign Sovereign Immunities Act providing that the Act is "subject to international agreements" was designed to resolve any doubt that might be created by an express conflict between the terms of preexisting treaty or like international agreement and the provisions of the Act. 28 U.S.C.A. §1604.

3. International Law —10.32

Foreign government did not waive its sovereign immunity defense to a civil suit arising out of agreement for the training of military personnel by failing to timely answer the complaint. 28 U.S.C.A. § 1605 (a)(1).

4. International Law —10.32

A foreign state does not waive its sovereign immunity by merely entering into a contract with another nation; there must be an intentional and knowing relinquishment of the legal right. 28 U.S.C.A. § 1605(a)(1).

5. International Law —10.32

Foreign government did not waive its sovereign immunity to civil suit arising out of agreement for the training of military personnel when it agreed to indemnify and hold harmless United States government from loss and liability that United States might incur in connection with the agreement. 28 U.S.C.A. § 1605(a)(1).

6. International Law — 10.33

Nonprofit agreement for the training of military personnel entered into between United States and defendant foreign government was not commercial in nature, and therefore, exception to Foreign Sovereign Immunities Act immunity for actions based on commercial activity was not applicable to civil action against foreign government arising out of such agreement. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

7. International Law — 10.33

Section of Foreign Sovereign Immunities Act abrogating foreign state's immunity when money damages are sought for death occurring in United States and caused by the tortious act or omission of foreign state or of any of its employees acting in the scope of employment did not apply to civil action brought against foreign government and arising out of agreement between foreign government and United States for the training of military personnel, since foreign government's employee was not in the course of his employment at the time of the accident, he was subject to United States Air Force regulations at the time of the accident, and it could not be said that foreign government tortiously failed to prepare its employee for life in the United States. 28 U.S.C.A. § 1605(a)(5).

8. International Law — 10.33

District court was without jurisdiction over defendant foreign government in suit arising out of agreement entered into between foreign government and United States for the training of military personnel, in absence of showing that any of the exceptions of the Foreign Sovereign Immunities Act deprived foreign government of its immunity. 28 U.S.C.A. §§ 1330, 1602 et seq., 1605-1607, 1604

9. Federal Civil Procedure — 2448, 2450

Defendant foreign government was entitled to new trial following entry of default judgment against it in suit arising out of agreement between foreign government and United States for the training of military personnel, since foreign government produced ample evidence to show that its failure to answer was not willful, but rather the product of confusion or ignorance, foreign government established that it had meritious defense to plaintiffs' claims, and factual bases therefore, and granting the motion for new trial would not greatly prejudice plaintiffs. Fed.Rules Civ. Proc. Rules 55 (c), 60 (b), 28 U.S.C.A.

V. F. Knickerbocker, Knickerbocker, Abrams & Cowan, Eagle Pass, Tex. Broadus A. Spivey and Paul E. Knisely, Spivey & Grigg, Austin, Tex., for plaintiffs.

Doran, Gulley & Etzel, Haygood Gulley, Del Rio, Tex., for defendant.

ORDER DECLARING DEFAULT JUDGMENT VOID FOR LACK OF JURISDICTION AND DISMISSING ACTION.

SUTTLE, Senior District Judge.

Only the plaintiffs were represented at the evidentiary hearing on the plaintiffs' motion for default judgment. Because the plaintiffs' evidence indicated that Saudi Arabia's failure to answer was wilful, and because the court hesitated to vigorously engage in the role of adversary on behalf of a wilfully defaulting defendant, the court was satisfied with a minimum of evidence in support of the plaintiffs' claims. 28 U.S.C. § 1608(e). Even so, the court entered the default judgment with some measure of misgiving. Transcript I at 89-92, 109.[1] The default judgment was signed on November 8, 1979, in San Antonio, but not filed until the clerk in Del Rio received it on November 10, 1979. Meanwhile, on November 9, the defendant filed its answer, specifically pleading the defense of sovereign immunity.

1. "Transcript I" is the transcript of the first hearing, held on August 22-23, 1979. "Transcript II" will refer to the transcript of the second hearing, held on April 22-23, 1980.

On April 22-23, 1980, this court held a second evidentiary hearing, this time with both plaintiffs and the defendant present. The Court received evidence and entertained oral arguments on the defendant's motion to have the default judgment declared void for lack of jurisdiction and on the defendant's motion for new trial. After making a full inquiry into the jurisdictional issue, and after carefully considering the oral argument offered at the adversary proceeding and the written briefs and memorandum submitted by both sides, the court concludes that it does not have subject matter or personal jurisdiction of the action. Consequently, the default judgment must be set aside as void and the action dismissed. In the alternative, the court finds from the record and from the evidence presented at the proceeding that the defendant's motion for new trial should be granted.

[1] Even though the court has previously entered a default judgment against Saudi Arabia, it now reexamines the issue of subject matter jurisdiction, for without subject matter jurisdiction, the default judgment is a nullity. *Nishimatsu Construction Co. v. Houston Nat. Bank,* 515 F.2d 1200, 1205 (5th Cir. 1975); Wright & Miller, FEDERAL PRACTICE & PROCEDURE §2695 p. 326.

The statute conferring jurisdiction on this court makes the absence of sovereign immunity a prerequisite to both subject matter and personal jurisdiction. 28 U.S.C. §1330. Consequently, the court made a thorough inquiry at the evidentiary hearing into the question of jurisdiction, fully developing all facts pertaining to sovereign immunity. See Transcript II at 151. *Upton v. Empire of Iran,* 459 F.Supp. 264, 265 (D.D.C. 1978); *Brickham v. Miller,* F2d 736, 737 (5th Cir. 1978).

[2] The Foreign Sovereign Immunities Act, [FSIA], provides a comprehensive procedure for the maintenance of suits *in personam* against foreign states and their agencies. *National American Corporation v. Federal Republic of Nigeria,* 448 F.Supp. 622, 638 (S.D.N .Y.1978).[1] The FSIA states generally that a foreign state shall be immune from the jurisdiction of the courts of the United States, except as specifically provided in §§ 1605-1607. The plaintiffs attempt to fit the facts of this case within the following exceptions:

1. *Waiver § 1605(a)(1)*

[3] The court finds that Saudi Arabia did not waive the sovereign immunity defense by failing to timely answer. *See, International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries,* 477 F.Supp. 553, 575. (C.D.Cal.1979) [the OPEC case], (wherein the question of waiver was specifically raised to the court—see paragraph 14 on page 579—yet the court found no waiver of sovereign immunity from the defendant's failure to answer). *Compare Flota Maritima Browning de cuba v. Motor Vessel Ciudad,* 335 F.2d 619 (4th Cir. 1964) (wherein the Republic of Cuba waived the defense of sovereign immunity by filing a general appearance and waiting three years to raise the defense of sovereign immunity).

[4, 5] A foreign state does not waive its sovereign immunity by merely entering into a contract with another nation. There must be an intentional and knowing relin-

2. This court rejects Saudi Arabia's argument that because § 1604 of the FSIA states that the Act is "subject to international agreements" the Act should not apply to this case at all. The court agrees with the plaintiffs that § 1604 was designed to resolve any doubt that may be created by an express conflict between the terms of a preexisting treaty or like international agreement and the provisions of the Foreign Sovereign Immunities Act. 1976 U.S.Code Cong. & Admin.News pp. 6604, 6616; *Behring International, Inc. v. Imperial Iranian Air Force,* 475 F.Supp. 383, 393 (D.N.J.1979). No such conflict is apparent here.

quishment of the legal right. *Mitchell v. Aetna Causalty & Surety Co.*, 579 F.2d 342, 347 (5th Cir. 1978). Saudi Arabia's agreement to indemnify and hold harmless the United States government from loss and liability that the United States might incur in connection with the agreement, and Saudi Arabia's agreement to be responsible for all student transportation, simply do not approximate the type of implicit waiver Congress contemplated in § 1605(a) (1). The legislative history cites actions more emphatically implying a waiver of immunity, such as, an agreement to arbitrate in another country, an agreement that the law of another country will govern the contract, or the filing of a responsive pleading in an action without raising the defense of sovereign immunity. 1976 U.S. Code Cong. & Admin.News at 6617. *See, e.g., Ipitrade International v. Federal Republic of Nigeria*, 465 F.Supp. 824, 826 (D.D.C.1978); *Flota Maritima Browning de Cuba v. Motor Vessel Ciudad*, 335 F.2d 619, 625 (4th Cir. 1964).

2. *Commercial Activity, § 1605(a)(2)*

[6] The plaintiffs also claim an exception to immunity under the section providing that a foreign state is not immune in any case "in which the action is based on a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). The statute explicitly directs that the character of an activity shall be determined by reference to the *nature* of the course of conduct or particular act, and not by reference to its purpose. 28 U.S.C. § 1603(d). The legislative history is helpful, but not determinative. The fact that "services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical." 1976. U.S.Code Cong. & Admin.News at 6615. The transaction at issue here could be broadly defined as the "sale of services" and so be deemed "commercial." But the activity could also be narrowly viewed as a non-profit agreement between two governments for the training of military personnel. So viewed, the transaction would be public or governmental, and protected by sovereign immunity.

At the adversary proceeding, counsel for Saudi Arabia directed the court's attention to the recent OPEC case, *International Association of Machinists and Aerospace Workers v. OPEC*, 477 F.Supp. 553 (C.D.Cal. 1979). In this case, as in the *OPEC* case, "commercial activity" is best defined narrowly; Saudi Arabia has the sole power to control its armed forces, and proper training of those forces is an essential ingredient of that control. In addition the fact that the contract is expressly "non-profit" convinces the court that the arrangement between the two sovereigns is not commercial in nature. *Compare United Euram Corporation v. Union of Soviet Socialist Republics*, 461 F.Supp. 609 (S.D.N.Y.1978), (the court found a "sale of services" commercial in nature where the plaintiff was to pay a fee to the Soviet agency *in addition* to the salaries and expenses of the tour.)

3. *Scope of Employment*

[7] Section 1605(a)(5) abrogates a foreign state's immunity when money damages are sought for death occurring in the United States and caused by the tortious act or omission of the foreign state or of any of its employees acting in the scope of employment. At the adversary hearing, Saudi Arabia proved that there were no flight training activities scheduled

either on the 16th or the 17th of September, Transcript II at 30, and that Al-Qassimie was in civilian clothes at the time of the accident. Transcript II at 28. Applying state law principles of respondeat superior, *Williams v. United States*, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955), the court fails to see how the soldier can be said to have been in the course of his employment even while off duty and pursuing an entirely personal matter. *Standard Oil Company v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *Gifford-Hill & Company v. Moore*, 479 S.W.2d 711, 716 (Tex.Civ.App.—Tyler 1972, no writ).

In addition, Saudi Arabia put on evidence that Al-Qassimie was subject to the United States Air Force regulations while at Laughlin Air Force Base. Thus, it was the United States government who apparently had the right to control the soldier's behavior in off-duty hours, not the Saudi Arabian government. *See, Greyhound Van Lines, Inc. v. Bellamy*, 502 S.W.2d 586, 588 Tex.Civ.App.—Waco 1973, no writ).

The plaintiffs also assert that section 1605(a)(5) applies because the foreign state itself tortiously failed to properly prepare Al-Qassimie for driving in the United States and negligently entrusted the automobile to the soldier. Saudi Arabia cannot be liable under a negligent entrustment theory because it did not own the automobile the soldier was driving at the time of the accident. Transcript II at 108. *See, Hines v. Nelson, 547 S.W.2d 378, 385 (Tex.Civ.App.—Tyler 1977,* no writ). Likewise, the fact that Al-Qassimie was issued a valid driver's license by the State of Texas negates any claim that Saudi Arabia tortiously failed to prepare him for life in the United States. Saudi Arabia is entitled to rely upon American testing procedures, based upon American standards, for the evaluation of Al-Qassimie's competence to operate automobiles on American roads.

[8] The defendant has demonstrated that none of the exceptions in FSIA operate to deprive Saudi Arabia of its immunity from this court's jurisdiction. Consequently, the default judgment must be declared void, and the action dismissed for lack of subject matter and personal jurisdiction. 28 U.S.C. § 1330.

[9] In the event that this court has erred in its ruling on the jurisdictional issue, the court rules that it would grant the defendant a new trial under Rules 55(c) and 60(b), F.R.C.P. Saudi Arabia produced ample evidence to show that its failure to answer was not, in fact, wilful, but rather the product of confusion or ignorance. *United Artists Corporation v. Freeman*, 605 F.2d 854, 857 (5th cir. 1979). Saudi Arabia's unique cultural differences and difficulties distinguish Saudi Arabia from domestic corporations who fail to answer due to an absence of minimal internal procedural safeguards. *See, Baez v. S.S. Kresge Co.*, 518 F.2d 349 (5th Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed. 2d 754 (1976), and *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th cir. 1976).

As discussed above, Saudi Arabia has shown that it has meritorious defenses to the plaintiffs' claims, and factual bases therefor. *See, Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969); *United Artists Corporation v. Freeman*, 605 F.2d 854, 857 n. 4 (5th Cir. 1979). Finally, granting the motion for new trial will not greatly prejudice the plaintiffs. *See Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979). The plaintiffs only assert that granting the motion for new trial will

cause them to incur additional expense. Transcript II at 160-162.

The court reiterates that its favorable ruling on the motion for new trial is strictly limited to the event that the court has erred in its determination of the jurisdictional question. Being convinced that it does not have jurisdiction over this action against Saudi Arabia, the court hereby declares the default judgment void, and dismisses the action for lack of subject matter and personal jurisdiction. The clerk shall enter judgment accordingly.

SO ORDERED.

C-1

IN THE UNITED STATES COURT OF APPPEALS

For The Fifth Circuit

Unit A

No. 80-1679

RAMON CASTRO, ET AL.,
Plaintiffs-Appellants,
versus

SAUDI ARABIA
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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(March 26, 1981)

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

1/ See *N.L.R.B. v. Amalgamated Clothing Workers of America. 1970, 430 F.2d 966.*

D-1

IN THE UNITED STATES COURT OF APPEALS

For The Fifth Circuit

Unit A

No. 80-1679

RAMON CASTRO, ET AL.,

Plaintiffs-Appellants,

versus

SAUDI ARABIA,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 26, 1981, 5 Cir., 198____, ____, F.2d ____).

(April 24, 1981)

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearsing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll of the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE